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NO. 86-426

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

RICHARD M. MADDOX, VICKIE ELLEN CALLAHAN, AND GARY DEAN GILLUM,

PETITIONERS,

v.

STATE OF ALABAMA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF AND ARGUMENT IN OPPOSITION TO THE PETITION

OF
CHARLES A. GRADDICK
ATTORNEY GENERAL,

JAMES B. PRUDE
ASSISTANT ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

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QUESTIONS PRESENTED

1. Where a state convict appeals his conviction, raising two unrelated federal questions and the state's highest judicial tribunal finally decides one federal question but orders further litigation on the other federal question, is the cause final for purposes of 28 U.S.C. §1257?

2. Does this Honorable Court have jurisdiction (28 U.S.C. §1257) to review a claim by a state convict, which could have been but was not presented to the highest state court in a manner which permitted that court to review the claim?

3(A). Where a law enforcement officer is in an open field and, with the aid of binoculars , observes contraband in open view inside a curtilage but outside of buildings, does such officer violate any right protected by the Fourth Amendment to the United States Constitution?

3(B). Do persons who were physically present on real property have standing to question observations of the property, where it does not appear what right, if any, such persons had to be on the property?

THE PARTIES

In the Circuit Court of Coosa County, Alabama, and the Supreme Court of Alabama the Parties were Richard M. Maddox, Vickie Ellen Callahan and Gary Dean Gillum, as Defendants and Petitioners, respectively, they being Petitioners herein, and the State of Alabama, as Plaintiff and Respondent, respectively, said State being Respondent herein. In the Court of Criminal Appeals the parties were and are the same Richard M. Maddox, Vickie Ellen Callahan and Gary Dean Gillum, as Appellants, and the same State of Alabama, as Appellee.

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TO THE PETITION

OPINIONS BELOW

The decisions and opinions of the Alabama appellate courts will not be reported until the state appellate

litigation is complete, at which time they will be reported as follows:

Maddox, et. al. v. State, _So.2d_ (Ala.Crim.App., June 11, 1985)

A copy of the same is appended to the Petition.

Ex parte Maddox, et al.; In Re: Maddox, et al. v. State, _So.2d_ (Ala. April 25, 1986)

A copy of the same is also appended to the petition.

Maddox v. State, __So.2d__ (Ala.Crim.App., Sept. 9, 1986)[1]

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[1]An application for rehearing by Petitioner Maddox is still pending in the Court of Criminal Appeals of Alabama.

JURISDICTION

The petitioners have invoked this Honorable Court's jurisdiction under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVSISIONS INVOLVED

The Petitioners are raising an alleged claim under the Fourth Amendment to the Constitution of the United States. In state court there was raised and is still being litigated a claim under the Eighth Amendment to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

Petitioners Maddox and Gillum were convicted of trafficking in marijuana under Section 20-2-80(1), Code of Alabama, 1975. Petitioner Callahan was convicted of possession of marijuana under Section 20-2-70(a), Code of Alabama, 1975 (Appendix "A").

STATEMENT OF THE CASE AND THE FACTS

The main issues at this point in the litigation are:

1. Whether the judgment of the Alabama Supreme Court is final within the meaning of 28 U.S.C. §1257, and

2. Whether the Alabama Supreme Court was presented with the claim now advanced by the Petitioners at a time and in a manner which would have allowed the Alabama Supreme Court to pass on it.

Any resolution of issue 2, above, requires some knowledge of Alabama Appellate practice. A brief digest of the same is, therefore, presented under "A", below.

A.

ALABAMA APPELLATE PRACTICE

Alabama law makes appeal liberally available, and all criminal convictions can

be appealed by the convict.[2] However, there is no plain error rule, except in death cases, (Rule 45A A.R.A.P. Appendix). To obtain review of a claim, appellant must obtain an adverse ruling from the trial court. Felder v. State, 470 So.2d 1321, 1326 (Ala.Crim.App. 1984); aff'd sub nom Ex parte Felder, 470 So.2d 1330 (Ala. 1985); Leverett v. State, 462 So.2d 972, 979 (Ala.Crim.App. 1984); cert. denied. However, if an adverse ruling is obtained in the trial court, the Court of Criminal Appeals of Alabama must review it, if it is

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[2]Code of Alabama, 1975

"§12-22-130. Appealing judgment of conviction.

"A person convicted of a criminal offense in the circuit court or other court from which an appeal lies directly to the supreme court or court of criminal appeals may appeal from the judgment of conviction to the appropriate appellate court."

See also Rules 1 & 3, A.R.A.P., Appendix "B" to this brief.

argued on appeal and may review it, even if it is not argued. Rule 45B A.R.A.P. Appendix "B".

In comparison with the liberal allowance of appeal, discretionary review by the Alabama Supreme Court, although available in most, if not all cases, is circumscribed by several procedural technicalities.

First, Supreme Court review is limited to facts found by the Court of Appeals and set out in that Court's opinion, although a remedy is provided to parties who believe that the Court of Appeals erred in not reciting facts shown by the record or in reciting facts not supported by the record. Rule 39(k) A.R.A.P. Appendix "B". Failure to preserve essential facts prevents Supreme Court review. Ex parte Grear, 484 So.2d 481 (Ala. 1985); Ex parte Genesco, 394 So.2d 385 (Ala. 1981); Ex part Phelps, 339 So.2d 124 (Ala. 1978).

Second, before petitioning the Alabama Supreme Court, the party must apply for

rehearing in the Court of Appeals "... on the point, issue or decision. ..." on which review will be sought in the Supreme Court. Rule 39(a) A.R.A.P. Appendix "B". See Rule 40 A.R.A.P. Appendix "B", for the requirements for rehearing. Failure to raise a point on rehearing prevents Supreme Court review, even if the point was argued on appeal.

Third, after obtaining an adverse ruling on his application for rehearing, the party must petition the Alabama Supreme Court for a writ of certiorari and show how the issues on which he desires review fit into one or more of certain well defined categories. Rule 39(c) A.R.A.P. Appendix "B". The Alabama Supreme Court is not authorized to consider claims not presented in the petition (Beck v. State, 365 So.2d 1006, 1007 [Ala. 1978]; Bland v. State, 277 Ala. 4, 166 So.2d 735 [1964]) and will not

consider claims presented in the petition but not argued in brief. Jackson v. State, 265 Ala. 690, 692, 93 So.2d 808 (1957).

B.

THE PROCEDURAL HISTORY OF THIS CASE

1.

AT THE TRIAL LEVEL

The Petitioners were indicted by the Grand Jury of Coosa County, Alabama for the trafficking in (Maddox and Gillum) and possession of (Callahan) marijuana. They moved to suppress the evidence seized pursuant to a facially valid search warrant on the grounds that the affidavit on which the warrant was issued contained certain allegedly illegally obtained evidence. At a hearing on the motion it appeared that the affiant officer had made observations of the premises from several points which were beyond the curtilage and had observed plants growing outside of a green house and, with the use of binoculars from said

beyond-the-curtilage point, had identified the plants as marijuana. The officer then moved to a point within the curtilage and made further observations. All of the officer's observations were placed before the warrant magistrate in the affidavit and sworn testimony. Although the use of binoculars was shown without dispute at the hearing, no particular issue was made of it at the trial level. In addition, it did not appear what, if any, standing the Petitioners had in the premises. The motion to suppress was overruled, and Maddox went to trial. On conviction, Maddox was sentenced to fifteen (15) years[3] imprisonment, after an unfavorable pre-sentence report. Some months later, the other

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[3]There is no provision for a maximum sentence under Section 20-2-80(1), Code of Alabama, 1975; Appendix "A". Under it, Maddox could be paroled after serving three (3) years. (Ibid, Sections 15-22-26, 20-2-80[1][a] and 81[a]). Persons convicted of trafficking are eligible for "good time". (Ibid, Section 14-9-41[a][1]. See also Roberts v. State, 482 So.2d 1293 [Ala.Crim.App. 1985]) All statutes are set out in Appendix "A".

Petitioners entered plea bargains, under which Gillum was convicted of trafficking in marijuana and sentenced to four (4) years inprisonment and Callahan was convicted of possession of marijuana and sentenced to three (3) years inprisonment. (See the trial records generally and Maddox, et al. v. State, _So.2d _[Ala.Crim.App. June 11, 1985]; Mns.Op.pp.1-9)

2.

APPEAL

On appeal, the Petitioners contended that the officer's intrusion into the curtilage tainted the warrant and voided it, notwithstanding the initial beyond-the-curtilage observations. The issues presented in the Petitioners' brief in the Court of Criminal Appeals were set out as follows:

" ISSUES PRESENTED FOR REVIEW

"I. Does the Plain View Doctrine apply where, as in the case at bar, the initial intrusion is unlawful and unconstitutional?

"II. Does the Open Fields Doctrine apply to property within the curtilage of the dwelling?

"III. Should Appellant Maddox's incriminating statements be suppressed in that they were the direct result of an illegal and unconstitutional search and seizure?" (Appellants' Brief, page 1)

In a supplemental brief, the following issues were presented:

"ISSUES PRESENTED FOR REVIEW

"I. Does the Plain View Doctrine apply where, as in the case bar, the initial intrusion is unlawful and unconstitutional?

"II. Does the Open Fields Doctrine apply to property within the curtlilage of the dwelling?

"III. Did the trial court abuse its discretion in sentencing Appellant Maddox to fifteen years in the custody of the Alabama Department of Corrections, while sentencing Appellants Callahan and Gillum to

three and four years, respectively, in violation of the Constitution of the United States and the State of Alabama?" (Appellants' Supplemental Brief, page iii)

The Court of Criminal Appeals found, without reaching the standing issue, that the officer's intrusion within the curtilage violated the Petitioners' U.S. Constitutional rights.[4] However, the Court concluded that there was sufficient legally obtained evidence before the magistrate to authorize the warrant, and upheld the search warrant.[5] The Court also rejected Petitioner Maddox's contention that his sentence was disproportionate. The Court affirmed all three convictions and sentences. Maddox, et al. v. State, _So.2d_ (Ala.Crim.App. June 11, 1985).

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[4]The State of Alabama has never conceded and still objects to this conclusion.

[5]See United States v. Karo, 468 U.S. , 82 L.Ed.2d 530, 544-545, 104 S.Ct. 3296, 3303 (1984), cited by the Court of Appeals at page 13 of the manuscript opinion. See also Franks v. Delaware, 438 U.S. 154, 171-172, 57 L.Ed.2d 667, 682, 98 S.Ct. 2674 (1978).

The Petitioners applied for rehearing and argued the following points:

> "I. THE ILLEGAL AND UNCONSTITUTIONAL INTRUSION BY OFFICER WINDSOR INTO THE CURTILAGE OF THE RESIDENCE WHERE APPELLANTS RESIDED REQUIRES THE SUPPRESSION OF ALL EVIDENCE DISCOVERED." (Rehearing Brief, page 7)

> "II. THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT MADDOX TO 15 YEARS IN THE CUSTODY OF THE ALABAMA DEPARTMENT OF CORRECTIONS, WHILE SENTENCING APPELLANTS CALLAHAN AND GILLUM TO THREE AND FOUR YEARS, RESPECTIVELY, IN VIOLATION OF THE CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF ALABAMA." (Rehearing Brief, page 20)

No issue was made of the officer's use of binoculars for his beyond-the-curtilage identification of the marijuana plants, either on original submission or rehearing.

3.

CERTIORARI IN THE ALABAMA SUPREME COURT

The issues presented to the Alabama Supreme Court in the Petitioners' certiorari petition and argued in their brief were the

same as those raised on rehearing in the Court of Criminal Appeals. As stated in the Petitioners' brief they were:

"ISSUES PRESENTED FOR REVIEW

> "I. Does the illegal and unconstitutional intrusion by Officer Windsor into the curtilage of the residence where Petitioners resided require the suppression of all evidence discovered within the curtilage?
>
> "II. Did the trial court abuse its discretion in sentencing Petitioner Maddox to 15 years in the custody of the Alabama Department of Corrections, while sentencing Petitioners Callahan and Gillum to three and four years, respectively, in violation of the constitutions of the United States and the State of Alabama?" (Petitioners' Brief, page V)

The Alabama Supreme Court issued the writ and affirmed the holding and reasoning of the Court of Criminal Appeals on the search and seizure issue. In addition, the Alabama Supreme Court ruled:

"Maddox also contends in this Court, as he did below, that the trial court abused its discretion in sentencing him to fifteen years' imprisonment, while sentencing Callahan and Gillum to three and four years' imprisonment, respectively.

"The appellate courts of this state are generally prohibited from reviewing the propriety of a sentence which is within the statutorily prescribed limits, as is Maddox's sentence. Brown v. State, 392 So.2d 1248 (Ala.Crim.App. 1980), cert. denied, 392 So.2d 1266 (Ala. 1981); Code of Alabama, 1975, §20-2-80. However, the appellate courts may review a sentence, which, although within the prescribed limitations, is so disproportionate to the offense charged that it constitutes a violation of a defendant's Eighth Amendment rights. Ex parte Harbor, 465 So. 2d 460, 461 (Ala. 1985) (Faulkner, J., dissenting).

"United States Supreme Court in Solem v. Helm, 463 U.S. 277 (1983), recognized that reviewing courts should grant substantial deference to the authority of legislatures in determing the kinds of limits of punishment for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. Yet, the sentence should be proportionate to the crime. In making proportionality determination, a court should be guided by objective criteria, including:

> '(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentenced imposed for commission of the same crime in other jurisdictions.' Solem v. Helm, 463 U.S. at 290-291.
>
> "Maddox received the maximum sentence allowed by law for his first felony conviction, while Gillum and Callahan received four-year sentence and a three-year sentence, respectively. The potential excessiveness of Maddox's sentence requires a review pursuant to the Eighth Amendment. Because the Court of Criminal Appeals did not address this issue, we must remand this cause to that court with directions to consider this case in light of Solem v. Helm, supra. It is so ordered.
>
> 'AFFIRMED IN PART AND REMANDED WITH DIRECTIONS." (Ex parte Maddox, So.2d. [Ala. April 25, 1986], Mns.-Op.pp. 6-7)

The Petitioners applied for rehearing in the

Alabama Supreme Court, as did the State.[6] In their brief in support of their application for rehearing, the Petitioners for the first time in any Alabama court argued that the officer's use of binoculars from beyond the curtilage constituted a violation of their constitutional rights. However, even at this point, the Petitioners did not present this as a separate issue. Both applications were overruled.

On remandment, the Court of Criminal Appeals ruled, on September 9, 1986, that Maddox's sentence

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[6]The State's application was limited to the ruling on the proportionality of Maddox's sentence. The State pointed out that the Alabama Supreme Court's ruling was in patent conflict with this Honorable Court's decisions and opinions in Pulley v. Harris, 465 U.S. 37, 79 L.Ed.2d 29, 104 S.Ct. 871 (1984); Solem v. Helm, 463 U.S. 277, 77 L.Ed.2d 637, 103 S.Ct. 3001 (1983) and Rummel v. Estelle, 445 U.S. 263, 63 L.Ed.2d 382, 100 S.Ct. 1133 (1980). Conflicts with United States Court of Appeals decisions were also called to the Alabama Supreme Court's attention. E.g., Smith v. Wainwright, 741 F.ed 1248, 1259 [11th Cir. 1984] cert. denied, _U.S._, 85 L.Ed.2d 151, 105 S.Ct. 1883 and Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985).

was not disproportionate under the Eighth Amendment to the U.S. Constitution. Maddox v. State, __So.2d.__(Ala.Crim.App. Sept. 9, 1986) On September 23, 1986, the Petitioner applied for rehearing in the Court of Criminal Appeals of Alabama. Said application is still outstanding.

SUMMARY OF THE ARGUMENT

1. Since there is an outstanding federal question still in active litigation in the state courts, this case is not final for purposes of 28 U.S.C. §1257.

2. Since the Petitioners did not raise the issue they seek to raise here on rehearing in the Court of Criminal Appeals of Alabama nor in their certiorari petition nor in their supportive brief in the Alabama Supreme Court, said issue was never before the Alabama Supreme Court. Rule 39(a) & (c) A.R.A.P. Appendix "B". Therefore, said issue is not properly before this Honorable Court. 28 U.S.C. §1257; Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969).

3. The use of binoculars to enhance an observation of objects that are not inside a home or other building from a point beyond the curtilage, does not violate the Fourth Amendment. United States v. Allen, 675 F.2d 1373 (9th Cir. 1980), United States v. Lace, 669 F.2d 46 (2nd Cir. 1981); United States v. Whaley, 779 F.2d 585 (11th Cir. 1985). See also Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861, 40 L.Ed.2d 607, 94 S.Ct. 2114 (1974); California v. Ciraolo, 476 U.S._, 90 L.Ed.2d 210, 106 S.Ct._(1986); Dow Chemical Company v. United States, 476 U.S._, 90 L.Ed.2d 226, 106 S.Ct. _(1986). In addition, the Petitioners never made any effort to show what standing they had in the observed premises. Therefore, the Petitioners have no standing to raise the claim they now raise. Rakas v. Illinois, 439 U.S. 128, 58 L.Ed.2d 387, 99 S.Ct. 421 (1978); United States v. Salvucci, 448 U.S. 83, 65 L.Ed.2d 619, 100

S.Ct. 2547 (1980); Rawlings v. Kentucky, 448 U.S. 98, 65 L.Ed.2d 633, 100 S.Ct. 2556 (1980).

ARGUMENT

I.

THIS CASE IS NOT FINAL WITHIN THE MEANING OF 28 U.S.C.§1257

Recognizing that this case is not final, the Petitioners urge this Honorable Court to follow the reasoning of Cox Broadcasting Corp. v. Cohn (420 U.S. 469, 43 L.Ed.2d 328, 95 S.Ct. 1029 [1975]). However, In Cox this Court observed:

> "...[The] circumstances... [permitting a departure from the finality requirement are] said to be very few,...; but as the cases have unfolded, the Court has recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come. There are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. §1257

> and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts. In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date... and immediate rather than delayed review would be the best way to avoid the mischief of economic waste and of delayed justice,. ..." (420 U.S. 469, 477-478, 43 L.Ed.2d 328, 339; emphasis supplied.)

The difference between the instant case and Cox and the other cases wherein this Honorable Court has dispensed with the finality requirement is that in this case the still pending issue is a federal constitutional question.[7] Should the Alabama Courts finally reject Maddox's Eighth Amendment proportionality claim, Maddox will certainly be seeking review in this Court, as will the State of Alabama in

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[7]The Petitioners characterize the issue as a state law issue, but the Alabama Supreme Court clearly based its decision on the Eighth Amendment to the Constitution of the United States.

the event of an opposite holding. Why not decide all of the federal questions in one proceeding, rather than one now and another later? On the other hand, the Petitioners have suggested no harm that will be visited on them, if piecemeal review is not allowed.

This case is not final, and the Petitioners have shown no reason for proceeding now. For these reasons, the writ should be denied.

II.

THE ALABAMA SUPREME COURT NEVER HAD AN OPPORTUNITY TO RULE ON THE ISSUE PRESENTED BY THE PETITION.

Prior to their application for rehearing in the Alabama Supreme Court the Petitioners' search and seizure argument had two parts:

1. In entering the curtilage after his initial observation of marijuana from an open field, the officer violated the petitioners' Fourth Amendment rights, and

2. Therefore, the search warrant was void.

The State's response was as follows: (1) The officer's action in entering the curtilage was reasonable in that his observations from the open field had given him probable cause and his intrusion into the curtilage was minor, brief and justified by the need to determine the exact nature and size of the operation. (2) The Petitioners have never made any effort to show their standing to object to the intrusion; indeed, Petitioner Maddox specifically denied any interest in the property. And, (3) prior to his intrusion, the officer had lawfully obtained sufficient evidence to constitute probable cause and had presented this lawfully obtained evidence to the magistrate. The Court of Criminal Appeals agreed that the officer had violated the Fourth Amendment in entering the curtilage, declined to address the State's standing argument and upheld the search warrant

under United States v. Karo, (468 U.S._, 82 L.Ed.2d 530, 544-545, 104 S.Ct. 3296 [1984]). The same arguments were advanced on rehearing in the Court of Appeals and on certiorari in the Alabama Supreme Court, and the results were the same. Until rehearing in the Alabama Supreme Court, no issue was made of the officer's use of binoculars for his beyond-the-curtilage identification of the marijuana. This issue, the only one presented by the instant petition in this Court, was first mentioned in the argument on the Petitioners' application for rehearing in the Alabama Supreme Court. The Alabama Supreme Court denied rehearing without opinion.

Under the plain words of 28 U.S.C. §1257(3), the state supreme court must have had the opportunity to address the federal question on which review is sought here. Where, as here, a state supreme court does not address

such an issue, it is presumed that the issue was not properly before that Court. Exxon Corp. v. Eagerton, note 3, 462 U.S. 176, 181, 76 L.Ed.2d 497, 504, 103 S.Ct. 2296 (1983); Hanson v. Denckla, 357 U.S. 235, 244, 2 L.Ed.2d 1283, 1292, 78 S.Ct. 1228 (1958). Slagle v. Ohio, 366 U.S. 259, 264, 6 L.Ed.2d 277, 281, 81 S.Ct. 1076 (1961). However, no such presumption is necessary here, since the Petitioners' failure to comply with the Alabama Rules of Appellate procedure with regard to the binoculars issue clearly barred the Alabama Supreme Court from considering that issue. Any one of the following deprives the Alabama Supreme Court of authority to review an issue on certiorari: (1) Failure to raise the point on rehearing in the Court of Criminal Appeals (R. 39([a] A.R.A.P. Appendix "B"), (2) Failure to present the point in the certiorari petition (Beck v. State, 365 So.2d 1006, 1007 [Ala. 1978]; Bland v. State, 277 Ala. 4, 166 So.2d

735 [1964]) or, (3) Failure to argue the point in brief. Jackson v. State, 265 Ala. 690, 692, 93 So.2d 808 (1957). The Petitioners failed in each of these regards as to the binoculars issue. Even if the Alabama Supreme Court noticed this claim, buried as it was in the rehearing argument and desired to address it, the Court would have had no jurisdiction to do so. Therefore, this claim is as a practical matter presented for the first time in this Court, and, for that reason, review should be denied. Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969).

III.

THE USE OF BINOCULARS DID NOT VIOLATE THE PETITIONERS' RIGHTS.

While acknowledging, at least in this Court, that the officer's observations from an

open field were proper,[8] the Petitioners argue that the officer's use of binoculars violated the Fourth Amendment. The numerous cases cited by the Petitioners in support of this position need not be distinguished by the Respondent State, because they all support the legality of the enhanced observations sub judice.

The only case cited by the Petitioners which found any enhanced observation objectionable was United Stats v. Toborda (635 F.2d 131 [2nd Cir. 1980]). But, the objected to enhanced observations in Toborda were of activities inside a home. The courts have always recognized greater privacy rights in the home than elsewhere. Compare Camara v. Municipal Court, 387 U.S. 523, 18 L.Ed.2d 930, 87 S. Ct. 1727 (1967) with Donovan v. Dewey, 452 U.S. 594, 69 L.Ed.2d 262, 101 S.Ct. 2534 (1981);

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[8]Oliver v. United States, _U.S._, 80 L.Ed.2d 214, 104 S.Ct. (1984); Hester v. United States, 265 U.S. 57, 68 L.Ed.2d 898, 44 S.Ct. 445 (1929).

Michigan v. Tylar, 436 U.S. 499, 56 L.Ed.2d 486, 98 S.Ct. 1942 (1977) with Michigan v. Clifford, 464 U.S. 287, 78 L.Ed.2d 477, 104 S.Ct. 641 (1984), and Stanley v. Georgia, 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243 (1969) with United States v. 37 Photographs, 402 U.S. 363, 376, 28 L.Ed.2d 822, 834, 91 S.Ct. 1440 (1971). See also United States v. Karo, 468 U.S._, 82 L.Ed.2d 530, 104 S.Ct. 3296 (1984) The United States Court of Appeals for the Second Circuit in Toborda simply applied this classic policy to enhanced views. The marijuana plants observed through the binoculars in the instant case were not inside a home or any other building and, therefore, Toborda does not apply here.

The other cases cited and relied on by the Petitioners all approved of the use of binoculars for observing outside conditions and activities within a curtilage from a point beyond. United States v. Allen, 675 F.2d 1373

(9th Cir. 1980)[9]; United States v. Lace, 669 F.2d 46 (2nd Cir. 1981)[10]; United States v. Whaley, 779 F.2d 585 (11th Cir. 1985).[11] The marijuana plants observed in the instant case were growing in the ground, inside the curtilage but outside of any building. Compare State v. Hobron (65 Haw. 157, 648 F.2d 194 [1982]), wherein the Supreme Court of Hawaii refused to extend its earlier decisions on telescopic observation of the interior of buildings to enhanced observations of exterior conditions. The decisions of this Honorable Court on enhanced observation and photography of exteriors have also consistently refused to

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[9]United States v. Toborda (491 F.Supp. 50 [E.D.N.Y., 1980]) distinguished at 675 F.2d 1373, 1380.

[10]United States v. Toborda (635 F.2d 131 [2nd Cir. 1980]) distinguished at 669 F.2d 46, 51.

[11]Toborda distinguished at 779 F.2d 585, 591, with regard to binocular enhanced observation of the interior of a building.

find fault under the Fourth Amendment. Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861, 40 L.Ed.2d 607, 94 S.Ct. 2114 (1974); California v. Ciraolo, 476 U.S._, 90 L.Ed.2d 210, 106 S.Ct._ (1986); Dow Chemical Company v. United States, 476 U.S._, 90 L.Ed.2d 226, 106 S.Ct._ (1986).

Finally, these Petitioners have made no effort to show their standing to object to any search of these premises. Petitioner Gillum was listed in the tax records as the owner of this property, but, for all that appears he may have leased the property to another and have had no more right to be on the premises than the officers. The record is silent as to Petitioner Callahan's connection with the property, and Petitioner Maddox affirmatively denied any connection with the property at all. For all that appears of record in this case, these Petitioners were trespassers on the property. This record will not support a finding that

these Petitioners had any standing at all to question any observation or search of this property. Rakas v. Illinois, 439 U.S. 128, 58 L.Ed.2d 387, 99 S.Ct. 421 (1978); United States v. Salvucci, 448 U.S. 83, 65 L.Ed.2d 619, 100 S.ct. 2547 (1980); Rawlings v. Kentucky, 448 U.S. 98, 65 L.Ed.2d 633, 100 S.Ct. 2556 (1980).

CONCLUSION

In conclusion, the Respondent submits as follows:

1. This case is not final for purposes of 28 U.S.C. §1257.

2. The Alabama Supreme Court never had the opportunity to address the issue the Petitioners raise here.

3. The enhanced observations were manifestly legal, and

4. The Petitioners have no standing to raise the issue here presented.

Therefore, the Respondent State prays that the writ be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, hereby certify that on this _____day of October, 1986, I did serve the requisite number of copies of the foregoing on the Attorney for Richard M. Maddox, Vickie Ellen Callahan, and Gary Dean Gillum, Petitioners, by mailing the same to said attorney, first-calss postage prepaid and addressed as follows:

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October 20, 1986

Honorable William H. Rehnquist
Chief Justice and the
Honorable Associate Justices of the
Supreme Court of the United States
Supreme Court Building
1 First Street, N.E.
Washington, D.C. 20543

Your Honors:

RE: Maddox, et al v. Alabama
No. 86-426

The purpose of this letter is to acquaint the Court with an additional development, which arose after the printing of our opposition brief in the above-styled cause.

Our brief is accurate up to October 16, 1986. However, on that date the Court of Criminal Appeals of Alabama denied rehearing to Petitioner Maddox on the Eighth Amendment issue. See page 2 of our brief and the paragraph which begins on page 17 and continues on page 18 of the same. Since the printing of our brief was also completed on that same date, October 16, 1986, we were not able to refer to this ruling in our brief.

Maddox now has two weeks from October 16, 1986, to seek review of this Eighth Amendment claim in the Alabama Supreme Court. If he declines to seek such review or if it is

denied, this case would become final, and the first issue and argument in our brief would be mooted. Of course, this would have no affect on our other issues and arguments.

Respectfully submitted,

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cc: Honorable David Cromwell Johnson
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Supreme Court of Alabama

Court of Criminal Appeals of Alabama